No. 11437

# IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

GRIFFITHS AND SPRAGUE STEVEDORING COMPANY, INCORPORATED, a corporation.

*Appellant*,

vs.

WATERFRONT EMPLOYERS ASSOCIATION OF THE PACIFIC COAST, a corporation,

*Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

## APPELLANT'S OPENING BRIEF

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THE ARGUS PRESS, SEATTLE

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## APPELLANT'S OPENING BRIEF

### STATEMENT OF JURISDICTION

The jurisdiction of the District Court is based on diversity of citizenship in a controversy involving more than Three Thousand Dollars ($3,000.00). The complaint alleges that appellee is a non-profit corporation formed under the laws of California, that appellant is a corporation formed under the laws of the State of Washington, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00) (Tr. 2). These allegations are admitted by appellant's answer by failure to deny them (Tr. 6) in accordance with Rule 8 (d) of the Rules of Civil Procedure. The trial

court's Findings 1, 2 and 3 (Tr. 36, 37) are in accord with these allegations.

Thus, jurisdiction clearly exists under Title 28, Section 41, United States Code Annotated.

## STATEMENT OF THE CASE

The appellee, plaintiff in the lower court, is a non-profit corporation formed under Sections 593-605e of the Civil Code of California. It was organized in June of 1937. As its name indicates, its membership consists of various commercial concerns which employ waterfront labor in the various ports of the Pacific Coast. Its purposes and functions comprehend the taking of action beneficial to its members, particularly in the field of water-front labor relations (Tr. 50 to 78).

The appellant, defendant in the lower court, is a Washington corporation engaged in the stevedoring business in Seattle, Washington. In that business it is necessarily an employer of longshoremen. It has been an associate member of the appellee ever since the latter was organized in 1937 (Findings 2 and 4, Tr. 36, 37).

This suit was brought by the appellee to recover judgment against appellant for dues alleged to be owing from appellant as such associate member for the calendar years 1943 and 1944. The dues claimed consist of a so-called tonnage tax, or tonnage assessment, in the amount of 2½c per ton on cargo loaded or discharged by appellant in its stevedoring operations during such years. All of the cargo involved in

the case was loaded or discharged by appellant in stevedoring operations for the account of the United States Army.

The District Court entered judgment against the appellant in the principal sum of $74,471.04. This amount correctly represents all tonnage loaded or discharged for the United States Army in the two years multiplied by 2½c. If appellant is liable at all, the amount stated in the judgment is correct. Appellant, however, denies liability for any part of this sum.

The facts of the case are complex as to detail and the manner of their presentation in the trial court adds considerably to this complexity. For the most part, however, the essential facts are contained in the record in documentary form. A rather detailed analysis of the facts will be given in connection with argument on each of the several points raised by the appellant. For the present the following brief statement will suffice.

The only form of dues sought to be charged by appellee is the tonnage assessment above mentioned. According to the appellee, this is a charge authorized by the statutes under which it is organized and by appellee's Articles of Incorporation and By-laws adopted pursuant to the statute. The appellee further asserts that this charge has been levied by its Board of Directors in the exercise of its powers. Specifically, the appellee asserts that this tonnage assessment, in the amount of 2½c per ton so far as this case is concerned, is payable by every member of appellee, vot-

ing or associate, for every ton of cargo which such member loads into or discharges from any vessel in any port of the Pacific Coast of the United States, except Alaska ports. Appellee concedes that the charge is tied strictly to the process of loading or discharging cargo and, consequently, that the handling of cargo otherwise than in the process of loading and discharging vessels does not subject any member to liability for payment of dues of any kind (Tr. 362, 377, 378). Finally, appellee asserts that it is right and proper for any member loading or discharging cargo to pass the 2½c assessment on to the operator of the vessel as a direct and distinct charge to the end that such operator, even though not a member of appellee, will provide the funds which support the appellee corporation. In fact, this procedure of passing on the ultimate burden of the assessment is definitely recommended in those instances where a member of appellee loads or discharges cargo for a vessel owned by or operated for the account of someone who is not a member of the appellee corporation (Tr. 101 to 103).

In addition to the foregoing, appellee asserts that appellant has agreed to pay the "tonnage assessment."

In the face of these contentions, appellant denies all liability in this case and asserts the following propositions which constitute the legal issues on this appeal:

1. That appellee's "tonnage assessment" program and any agreement with respect thereto are contrary to public policy and void as applied to cargo loaded and discharged for the account of the United States Army, that being the only type of cargo involved in this case.

2. That appellee's "tonnage assessment program" and any agreement with respect thereto are void because the statute under which appellee is organized requires that any dues charged by appellee be uniform as to its members or classes of members and such uniformity does not exist.

3. That appellee, under its Articles of Incorporation and By-laws, is without power to levy or collect dues from any associate member such as appellant.

4. That all attempted exercises by appellee's Board of Directors of the asserted power to levy dues are invalid because no vote of the appellee's membership fixing of a maximum rate for such dues has been had as required by the By-laws.

5. That in fact the appellee's Board of Directors have never adopted any resolution levying the tonnage assessment against any associate member, including the appellant.

6. That appellee's "tonnage assessment" program and any asserted agreement of appellee to comply therewith are void because appellee has threatened to enforce the same by economic duress.

7. That appellant has never, in fact, agreed to pay the "tonnage assessment."

For the most part appellant has no quarrel with the trial court's affirmative findings of fact. Consistent with the contentions above listed, it does deny the correctness of Finding 7 (Tr. 38) which states that the tonnage assessment has been levied and assessed against appellant pursuant to the by-laws; Finding 9 (Tr. 38) which implies that a certain Agreement of May 9, 1940, is applicable to all non-member cargo, including that handled for the account of the Army;

Finding 16 (Tr. 41) insofar as it indicates willingness of the United States Army to bear the assessment; and Finding 17 (Tr. 41) stating that the tonnage assessment is uniform. All of these findings are in effect legal or factual conclusions which stand or fall upon the evidence and the law of the case. The pertinent evidence in each of these instances is documentary in character. There is, despite the mass of evidence, no real dispute as to the facts of the case, but rather only as to the factual and legal conclusions to be drawn therefrom. The pertinent facts in more detailed form will be stated in connection with the argument upon each of the points listed above.

## SPECIFICATION OF ERRORS

The trial court erred in the following particulars:

1. In failing to conclude as a matter of law that appellee's claim is contrary to public policy and therefore void and unenforceable.

2. In finding that appellee's claim is a uniform assessment falling equally and alike on all members of the appellee who load and discharge cargo (Finding 17, Tr. 41).

3. In failing to find as a fact that appellee's claim is not uniform as to the various members or classes of members of the appellee.

4. In failing to make a conclusion of law that such lack of uniformity renders appellee's claim unenforceable.

5. In failing to make a conclusion of law that appellee is without power to levy and collect dues from an associate member such as appellant.

6. In finding that appellee levied the tonnage assessment pursuant to its By-laws and in failing to find that no dues have ever been levied by appellee pursuant to such By-laws (Finding 7, Tr. 38).

7. In failing to find that no resolution levying dues has ever been adopted applicable to an associate member such as appellant (Finding 7, Tr. 38).

8. In failing to find that appellant at no time contracted to pay the tonnage tax on Army cargo.

9. In failing to find that appellee's claim is unenforceable because based on duress consisting of threats of economic reprisals against appellant.

10. In failing to conclude from all evidence in the case that judgment should be entered in favor of appellant and in failing to enter judgment in appellant's favor.

## ARGUMENT

**Appellee's Claim Is Contrary to Public Policy and Therefore Void. (Specifications of Error 1 and 10)**

The foregoing proposition disposes of every issue in this case. It is manifest that if appellee's claim contravenes public policy to such an extent that it is legally void, no agreement of the parties can give it validity nor can the fact that appelleee possesses a general power to collect dues from its members sustain

a specific dues program which so conflicts with public policy.

What then are the public policy aspects of this case? Simply that the avowed program here is to require the appellant to pay dues measured by the volume of services rendered by it to a branch of the United States government, to-wit, the United States Army with the added recommendation that the amount of these dues be included in the contract with the Army, either directly or indirectly, whichever may be the more feasible. The appellant maintains that this program by which appellee inevitably seeks to finance its operations by adding to the costs of public contracts made by its members is so absolutely contrary to public policy as recognized by the courts as to be wholly illegal and void.

Ordinarily, one would expect that any non-profit organization would finance its operations by some method which would call on all of its members to contribute to its support on some uniform basis. It is well known that such organizations frequently have different classes of members and that, where there are such different classes, they generally possess different rights within the organization and frequently have different financial obligations to it.

The appellee corporation has two classes of members designated respectively as voting and associate members. There are now 84 voting members and 47 associate members. Formerly the membership was greater (516). As the names imply, voting members possess the entire voting power which, of course, includes the

power to elect the appellee's Board of Directors, which in turn determines the policies of the appellee corporation and has the management of its affairs. Steamship operators and their agents are eligible for voting membership. Other employers of waterfront labor, primarily stevedoring companies and terminal operators, are eligible for associate membership. The appellant is in the latter category (Appellee's Articles and By-Laws, Tr. 50 to 78).

The Articles and the By-laws of the appellee are not entirely clear as to the relative financial obligations of the two classes of members. One of appellant's points on this appeal is that, under a proper construction of these documents, associate members are wholly exempt from liability for dues. That precise question is, however, of no moment so far as the problem of public policy is concerned. That problem rests rather on what has actually been done by appellee under the guise of levying dues. What appellee might legally and properly have done is another question.

The appellee's dues program, as expounded by appellee, comes down simply to the position that the cargo should bear the cost (Tr. 363), that only such members of appellee as actually place cargo aboard ship or remove it from the ship would pay the 2½ cents per ton (Tr. 377, 378) and that such paying members should obtain the money from the carrier by adding the charge to the amount of their contracts with the carrier (Tr. 101 to 103). The end result of this program is twofold. First, the charge is to be passed on to the carrier even though the latter, as in the case of the United States Army, is not a member of the appellee

corporation in any sense. Second, a member may, to the extent that his business operations do not involve the precise task of loading or unloading vessels, enjoy all of the benefits of membership without any financial responsibility to the appellee (Tr. 378). Some members never or substantially never engage in loading or unloading operations (Tr. 425). Terminal operators, for example, employ longshoremen under labor contracts negotiated by the appellee corporation, but since these men are used for dock work, that is, moving cargo on the dock, as distinct from placing it aboard or removing it from a vessel, the terminal operator is not called upon to support the appellee's operations (Tr. 378, 425, 435 to 437, 475). It is thus apparent that the whole dues program is focused upon the single phase of loading and discharging cargo to the end that the actual burden of financing the appellee will be placed upon the carrier, member or non-member as the case may be, and that the member which conducts the loading operations is in ultimate practical effect designed to be a sort of collecting agent for the appellee. It is, to quote appellee's president, a "form of direct taxation" (Tr. 363).

It is perhaps superfluous to document this account, because we anticipate that the appellee which so frankly espoused these positions at the trial will not contradict them here. However, for the court's convenience, the following references to the record will bear out what has been said.

A considerable number of resolutions have been adopted by appellee's Board of Directors relative to the

tonnage assessment here involved. The pertinent ones are in the record. We summarize them briefly.

The first is a resolution adopted July 31, 1937, shortly after appellee's organization (Plaintiff's Exhibit 3-A, Tr. 95, 96). So far as here material it levies "one assessment" at the rate of 2 cents per ton on general cargo. It does not say who shall pay this amount. It does, however, make it clear that at this early date, the appellee entertained the idea that its dues collecting power extended to persons other than its own members, because provision was made for collection of another form of charge in the following language:

> "Operators who are not members of either individual port association or the Coast Association: 2½c per man per hour." (Tr. 95)

We have here the origin of a delusion of grandeur that any person who elects to employ a longshoreman, even though he has no connection with appellee or with any local association which is an associate member of appellee (Tr. 55), must pay tribute to the appellee Coast Association (Tr. 304).

This resolution of July 31, 1937, was amended by further resolution on May 11, 1938 (Plaintiff's Exhibit 5, Tr. 96, 97). This increased the general cargo tonnage assessment to 2½ cents per manifest ton, stating that the levy is "on all cargo loaded and/or discharged at Ports on the Pacific Coast of the United States (except Alaska ports)." Again this resolution does not state precisely who is to be liable, but the notion of a charge *in rem* against the cargo is most evident.

The third resolution was adopted February 14, 1940 (Plaintiff's Exhibit 7, Tr. 99, 100). It recites that "confusion has arisen" concerning the tonnage assessment. Parenthetically, it may be said that an examination of all the records of appellee, as shown by the record in this case, demonstrates that confusion is the rule and not the exception, since at no time have appellee's Board of Directors ever adopted a resolution clearly stating its position on the subject of dues. However, this particular resolution continues the 2½ cents per ton rate on general cargo stating that this levy is made on "all tonnage loaded or discharged at all U. S. Pacific Coast Ports (except Alaska ports)."

At this point, the question of collecting from non-members received more direct attention. It is to be remembered that prior to the war much, if not most, of the cargo entering and leaving Pacific Coast ports was carried by steamship companies which were voting members of appellee. However, as foreshadowed by the resolution of July 31, 1937 (Tr. 95), appellee did not propose to let any non-member enter or leave any Pacific Coast port without paying for the privilege. Apparently, the man-hour charge specified in the July 31, 1937, resolution had not been wholly effective to meet this situation, because on February 15, 1940, we find appellee's Board of Directors adopting a recommendation made on the same day by its stevedoring committee.

In substance this February 15, 1940, resolution (Defendant's Exhibits D and E, Tr. 197 to 199) provided for the following things: All members of appellee, who

furnished stevedoring service, were to be provided with a list of appellee's voting members. This would enable them to identify non-member steamship companies. Before commencing work for any such non-member they should ascertain whether the non-member would agree to pay the tonnage tax and, if so, collect the proper amount from the non-member. If the non-member should refuse to pay the 2½ cents per ton "tonnage tax," the member doing the stevedoring should insert in his contract with the non-member a clause requiring the non-member to pay 4 cents per man-hour on the work done for him. The record, independent of this resolution, shows that the latter charge would be greater than the tonnage charge (Tr. 699). Finally, with the most brazen frankness, this resolution states that the man-hour charge to non-members is "predicated upon the understanding that Waterfront Employers of the Pacific Coast will proceed at once to reach an agreement with the District Officials of the I. L. & W. U., that where owners or operators of non-member vessels do not agree to promptly pay tonnage or man-hour assessments, no men will be furnished by the I. L. & W. U. or any of its Locals for stevedoring work on such vessels * * *" (Tr. 198, 199). The I. L. & W. U. is, of course, the Longshoremen's Union with which appellee makes labor agreements (Tr. 141).

This drastic action appears to have not been wholly effective, so that the matter of non-member liability was dealt with further on May 8 and May 9, 1940. On the former date, appellee's Board of Directors adopted as its official action any plan "for assessing and col-

lecting non-member tonnage" which might thereafter be worked out by a committee to be appointed, subject to the further requirement that the committee report be consented to in writing by "a majority of the member stevedores in the several ports" (Tr. 101, Plaintiff's Ex. 9). The Committee's action, so approved in advance, took the form of a written contract ultimately signed by a majority of the stevedores, including appellant.

This contract (Tr. 101 to 103) is most strongly relied upon by appellee both to sustain its claim against appellant and to establish its theories as to the general scope of its "tonnage tax" program. It is also made the subject of the trial court's Finding of Fact No. 9 (Tr. 38). It is a poorly drawn document but its essential terms are clear. It first provides that member stevedores "undertake to collect and remit the uniform coast tonnage tax on all cargo handled by them for non-member steamship companies." Then follows a provision that member stevedores will insert a clause in their contracts with non-members imposing similar liability on the non-members. The appellee then engages to keep the stevedore members advised as to the names of member steamship companies "for whom the stevedore accepts no responsibility for payment of tonnage tax," as to current tonnage assessment rates and as to methods of reporting tonnage and paying assessments. The appellee further undertakes to "consider relieving member stevedores from payment of tonnage assessments for non-member lines upon written state-

ment of the facts that they have tried but failed to collect under the foregoing contract provisions" (Tr. 102). Finally, we again find a concluding clause under which appellee seeks to sweep all the fish into its net by requiring non-member stevedores serving non-member steamship companies to pay the more expensive 4 cents per man-hour charge already referred to (Tr. 103).

Upon reading this agreement one would naturally assume that the non-member steamship "companies" referred to therein would not include operation of vessels by the United States government. The appellee, however, has long insisted and still insists that the government is caught by this contract just as effectively as the private non-member steamship operator. Appellant denies that the agreement can be so construed. The language is plain and it cannot be so warped in meaning so as to include the United States Army.

In fact, the matter of government cargo soon received specific attention. As this court will judicially recognize, this agreement of May 9, 1940, came on the very eve of the invasion of the Low Countries and France by the German Army. France capitulated in June of 1940 and from that time forward the government of the United States commenced what was first called the defense effort which changed to the war effort after December 7, 1941. Transportation of Army cargo became a matter of moment before Pearl Harbor and thereafter the government took over all shipping. Private steamship operators, including all the voting members of the appellee, thus ceased to carry on their regular business, although they did act thereafter for

the government as agents conducting its steamship operations (Tr. 500, 501) and received compensation for so doing (Tr. 505).

The practical importance of dealing with the subject of Army cargo is reflected by the next resolution adopted March 12, 1941 (Plaintiff's Ex. 14, Tr. 110, 111). That resolution states that it is the "recommendation" of the Board that member stevedores handling Army and Navy cargo "be required to collect the tonnage assessment and pay the Association assessments for such cargo handled in conformity with the agreement, authorized by the Board May 8, 1940 * * *."

Again, on April 16, 1942, a further resolution was passed dealing with Army and Navy cargo (Plaintiff's Ex. 15, Tr. 111). That resolution instructed appellee's treasurer to request members "to regularly report * * * all tonnage handled by them for the account of the Army and the Navy * * *," and directed the treasurer further to outline to members the manner of reporting such tonnage. This the treasurer did by letter of April 27, 1942 (Plaintiff's Ex. 16, Tr. 112). This letter is of interest in its entirety, but as applied to the present point especially so in stating that appellee understands that the tonnage assessment is actually being paid by the Army and Navy under contracts between them and the stevedores.

Finally, on June 25, 1942, appellee's Board, by resolution, again speaks on the subject (Plaintiff's Ex. 17, Tr. 115). It there authorizes the treasurer to advise those members performing stevedoring service for

the Army, Navy or War Shipping Administration that they are "obligated to report the tonnage so handled and pay the assessment to the Association in the same manner that non-member tonnage has been reported to the association," and that the rate is still 2½ cents per ton.

The foregoing series of resolutions demonstrates beyond all question that it is the recommendation, purpose and policy of the appellee to "tax" Army cargo directly for appellee's support. All of the later resolutions take the position that the stevedore should treat the Army like a "non-member steamship company," the duty in such case being that the stevedore should "collect and remit." The March 12, 1941, resolution positively states that stevedore members shall be "required to collect" from the Army, thus making it the real dues payer and financier of appellee. That such a method of financing the affairs of an employer's association is utterly contrary to public policy is established by the following decisions:

*Kentucky Association of Highway Contractors v. J. C. Williams*, 213 Ky. 167, 280 S.W. 937, 45 A.L.R. 544;

*Constructors Association of Western Pennsylvania v. Seeds*, 142 Pa. Super. 59, 15 Atl. (2d) 467;

*Associated Wisconsin Contractors v. Lathers*, 235 Wis. 14, 291 N.W. 770;

*Master Builders Association of Kansas v. Carson*, 132 Kan. 606, 296 Pac. 693;

*Bailey v. Master Plumber Association*, 103 Tenn. 99.

In each of these cases, the plaintiff was, like appellee here, an association of business concerns. In each instance, the suit was one to collect dues from a member and in every instance the dues were in the form of a percentage of the amount of the members' contracts with public agencies. In all of the cases the court held that the suits must fail because the claims were contrary to public policy.

In *Kentucky Association of Highway Contractors v. J. C. Williams, supra*, 213 Ky. 167, 280 S.W. 937, 45 A.L.R. 544, the membership of the plaintiff non-profit corporation consisted of highway contractors. Its articles of incorporation contained a statement of purposes fully as laudable as those set forth in the articles of Waterfront Employers Association of the Pacific Coast. Its by-laws provided for annual dues of $50.00 a member and, in addition, "one-fourth of 1 per cent on all federal, state, and county highway work in the state of Kentucky, contracted for by members of this association, shall be paid into this association."

Defendant, a member of the plaintiff, procured three highway construction contracts at contract prices aggregating something over $400,000.00. He paid a part of the one-fourth of one per cent charge called for by the by-law above quoted, but refused to pay remaining amounts aggregating about $770.00. Suit was brought against him by the association to collect this amount, and the defense was illegality of the by-law. The plaintiff introduced evidence as to its praiseworthy purposes and maintained that these purposes plus the reasonableness of the amount of the dues, made the by-law valid. The court, however, held that

the by-law was invalid and denied plaintiff any recovery.

In arriving at this decision, the court analyzed the general authorities in some detail on the question of the propriety of provisions such as this which have a tendency to add to the cost of public contracts. The court then said:

> "It will be seen that the prohibited contracts, upon the ground that they are against public policy, are those which have 'a tendency to be injurious to the public or against the public good,' and that their validity is determined by their general tendency *at the time* they are made, and, if such tendency is opposed to the interest of the public, the contract will be invalid, 'even though the intent of the parties was good, and no injury to the public would result in the particular case. The test is the *evil tendency* of the contract and not its actual injury to the public in a particular instance.' "

And, further, the court stated:

> "Human nature is a thing of which courts will take judicial knowledge, and a part of it is to protect oneself from expenses and financial burdens, as much so as possible, and to shift or avoid them whenever an opportunity exists. The contract here involved directly creates that opportunity; i.e., it creates a stimulus on the part of the member contractor to add to his bid on all public contracts the amount that the association's contract with him forces him to pay to it, and to thereby recoup that amount for his own protection, from the public authority letting the contract. The contract sued on can have no other tendency, since it is a *direct* levy by plaintiff of a

tax on the contract price of its members made with the public and to be paid out of public funds, and the purpose which it tends to accomplish with that tax after it is collected has nothing whatever to do with the question.

"But it may be argued that it is lawful for contractors to organize themselves for legitimate purposes and to collect dues from the members of such organization for the purpose of maintaining and supporting it, and that, if the dues here involved are against public policy, then any that might be devised would likewise be so; but such is not true, since the collection of dues from a member, regardless of whether he obtains contracts, is in no sense a direct tax upon, or the levying of a tribute on, the price of his contracts. In the supposed case he pays his dues out of any money that he might possess, regardless of the fact as to whether he may ever become a successful bidder, and such a method has in no sense a *direct* tendency to injuriously affect the public good. At most, it could only remotely do so, thereby presenting a case not coming within the 'public policy' rule, and consequently a contract not forbidden by the law."

The Court thus squarely held that a dues program of this character would have a tendency to influence the cost of public contracts to the injury of the public, and the mere existence of such a tendency at the time in question rendered the contractual features of the by-law wholly unenforceable.

In *Constructors Association of Western Pennsylvania v. Seeds*, *supra*, 142 Pa. Super. 59, 15 Atl. (2d) 467, the plaintiff association, whose membership likewise consisted of contractors, had a by-law like that

involved in the Kentucky case. This Pennsylvania by-law provided for a $50.00 admission fee and a further amount of:

> "* * * one-half of one per cent of the gross amount of each contract secured in the area covered by the Association. This percentage, one-half of one per cent, shall be included in any estimates for new work taken subsequent to the date of the incorporation of this Association, and within the limits of the boundaries of the authority of the Association."

Subsequently, this percentage was reduced to one-fourth of one per cent. The defendant member of the Association was awarded a contract in the sum of over $800,000.00 by the United States Government for the construction of a dam over the Ohio River in Pennsylvania. This action was brought by the Association to recover one-fourth of one per cent of the total contract price amounting to $2,192.94. The defendant offered no evidence, but moved for a directed verdict on the ground that the by-law above quoted was invalid as contrary to the public policy of the Commonwealth of Pennsylvania and, therefore, unenforceable. This motion was granted by the trial court and affirmed on appeal. In affirming the lower court, the appellate court stated:

> "The by-law under consideration constitutes the agreement between the association and its members and is subject to the same rules of construction as a written contract signed by all the parties. Like all by-laws it shall be deemed to be legal unless manifestly it tends to injure the public in some way. Its validity, however, does not depend upon the actual injury that may result to

> the public. The test to be applied to determine its legality is whether its general tendency is opposed to public policy; if so, the contract is unenforceable notwithstanding the intention of the parties is good and no injury has actually resulted. *Kuhn v. Buhl*, 251 Pa. 348, 370, 96 A. 977, Ann. Cas. 1917D, 415."

The Court then referred to the Restatement of the Law of Contracts, Volume 2, Section 517, pointing out that under one of the examples given in this section of the Restatement, a contract of this kind is squarely contrary to public policy. The Court next referred to the Kentucky case above discussed and, after considering it in some detail, stated:

> "* * * The by-law before us, as the one in the Kentucky case, has an undoubted tendency to cause members to add the percentage payable to the association to their bid and thus in effect tax all contracts public and private to the extent of the percentage added. We agree with the learned court below in its rejection of the appellant's argument that the percentage paid the association would be absorbed or included in the indirect expenses or profit in the bid. As it aptly said: 'No matter how the item may be designated, or where concealed, it is still an item of expense which the contractor must consider and which must be reflected in his bid'."

And, finally, after discussing *Master Builders Association of Kansas v. Carson* (Kan.) 296 Pac. 693, the court said (page 469):

> "It is immaterial whether or not the by-law provides that the percentage payable to the association is added to and included in the bid, the

plain effect is the same in either case. See *Kentucky Association of Highway Contractors v. Williams, supra.*"

In *Associated Wisconsin Contractors v. Lathers, supra,* 235 Wis. 14, 291 N.W. 770. There the plaintiff, a Wisconsin non-stock corporation, brought suit to collect a membership assessment claimed to be due from the defendant member for the year 1938. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled and the defendant appealed. The complaint alleged that the plaintiff was a Wisconsin non-stock corporation consisting of members of the highway construction industry and affiliated interests, the purpose of which is "to promote the business of the individual members, advance the mutual interests to cultivate relations and cooperative efforts." The complaint further alleged that on February 28, 1938, the defendant had signed a written application for membership in which he agreed to accept the by-laws and the rules of the association, especially those pertaining to dues; that the application was accepted and $250.00 was paid as advance dues; that the resolution as to dues provides that each member shall pay as an assessment for 1938 "one-fourth of one per cent of the amount of each contract secured in that year, which amount was to be paid sixty days after the award of the contract." The plaintiff alleged that the net amount owing from defendant computed on the above basis was $410.54 for which judgment was sought. The Supreme Court of Wisconsin held this complaint to be legally insufficient, that

the demurrer should have been sustained, and, accordingly, reversed the lower court. In arriving at this holding, it stated:

> "* * * An agreement limited to having a common treasury into which a certain percentage of the revenue from public contracts is to be paid under condemnation of the rule protecting the freedom and integrity of competition in securing contracts for public work. *Morgan v. Gove*, 206 Cal. 627, 275 P. 415, 62 A.L.R. 219; 2 Restatement, Contracts, p. 1002, §517. Where the complaint shows an assessment on contractors engaged in public works determined by the volume of public business obtained by them, the inference is that the expenses will be allocated to the bids and will tend to increase the expenditure on the part of the public with relation to those contracts. If that inference is not repelled by allegations of fact showing that such is not the case, the complaint is then insufficient for failure to state a cause of action. *Kellogg v. Larkin*, 3 Pin. 123, 56 Am. Dec. 164. It is then treated as a claim based on a contract void as against public policy. * * *"

* * * * * * * * * * *

> "* * * The public policy which insists upon competition between bidders for public work and dictates that contracts shall be let to the lowest responsible bidder is violated when prospective bidders enter into an arrangement to exact from each other a percentage 'of the amount of each contract secured' during the ensuing year. So valued is this method under our public policy that the law casts out as illegal an arrangement to hamper competitive bidding when so limited and so described. If the mere tendency or purpose of a contract works against public policy, it is illegal,

even though no actual damage be shown. 12 Am. Juris., p. 664, §672; *Houlton v. Nichol*, 93 Wis. 393, 67 N.W. 715, 33 L.R.A. 166, 57 Am. St. Rep. 928; 2 Page, Contracts, 2d ed., p. 1164, §672. From the allegations of the complaint it appears that the respondent association levies an assessment on the price to be paid by the public on contracts let to the members of the association. As pointed out, this is not lawful. The purpose of the rule is to prevent contractors from assuming a position where selfish motives may impel them to sacrifice the public good to private benefit. 6 R.C.L. 731, §136; *Kentucky Association of Highway Contractors v. Williams*, 213 Ky. 167, 280 S.W. 937, 45 A.L.R. 544; 13 C.J., p. 424, §360; 17 C.J.S., Contracts, page 563, §211, page 580, §215; 5 Williston, Contracts, Revised ed., p. 4691, §1663; 2 Page, Contracts, 2d ed., p. 1545, §875, and supplement."

The court's discussion in this case was so clear as to require little comment. It is, however, interesting to note that this case decided by the Wisconsin Supreme Court preceded by a few months the decision of the Pennsylvania Court in the other case. Apparently the two cases arose so nearly at the same time that neither court had the benefit of the reasoning of the other court. However, both follow the doctrine of the Kentucky case and both significantly rely upon the Restatement. Neither entertain any doubt whatsoever as to the illegality of this type of dues sought to be imposed by the commercial associations.

In *Master Builders' Association of Kansas v. Carson, supra*, 132 Kan. 606, 296 Pac. 693, the by-law re-

quirement of the plaintiff association was that each member pay one-half of one percent of the full contract price on all work done by such member. That by-law was found to be invalid on the same principles as those mentioned in the other cases, that is, because of its evil tendency to cause increased cost of public contracts. In discussing the factual problem, the court said:

> " * * * What is the tendency of the contract in question? Knowing human nature as we do, this court is bound to assume that the contractor bidding on a job, knowing that he will be called upon to pay one-half of 1 per cent. of the contract price to a stranger to the contract, will add that amount to the amount of his bid. This, of course, would increase the cost of the school building that much. This must be paid by the consumer."

It is clear from the foregoing cases that all that the law requires as a basis for complete condemnation of such methods of financing by employer associations is that they show a *tendency* to add to the cost of public contracts. The rule does not require proof that such a tendency actually was carried into execution or encouraged by the association. In the case involved upon this appeal, however, it is frankly conceded that the member should make every effort to pass the charge directly on to the public. In fact, the first resolution relative to Army cargo "required" the stevedoring companies to collect the assessment from the Army, and the later resolutions are of the same general tenor. In such circumstances the dictates of public policy against the validity of the claim become overwhelming.

In the court below, the appellee relied upon one case which it asserted laid down a different and sounder rule. That case is *Electrical Contractors' Association of the City of Chicago v. A. S. Shulman Electric Company*, 391 Ill. 333, 63 N. E. (2d) 392. The trial judge in his oral remarks at the time of his decision also relied on this case (Tr. 34).

While the Illinois case does not agree without reservation with the holdings of the other courts above mentioned, the case there presented is so clearly distinguishable from the case now before the court as to render the decision worthless as authority. In the first place the Illinois decision apparently did not involve a situation in which the members of the employer association were paying as dues a percentage of public contracts. Members were required to pay 4/10 of 1% of all construction or merchandising business. The argument was not that the cost of any public contract was increased, but rather a somewhat obscure argument was made that competition was being stifled. The court was not able to see how that result might follow. In contrast, the present case leaves no room for doubt as to the direct evil consequences which attend passing on the tonnage tax to the government as appellee encourages its members to do.

Further, the Illinois court indicates that its position would be entirely different if the proof showed that the dues were in fact added to the contract prices of the members. Thus the court states that "It is our view that unless there is proof that such percentage was added to the contract price, there is nothing that

condemns it * * *." And again, "As previously noted, we do not agree that any inference that the public is going to be injured arises from the mere fact that the money collected from each member was computed on the percentage of business done." Certainly the Illinois court means to indicate that when the question passes from the field of inference into that of proof, as in the case at bar, the proof of a purpose to impose the burden on the government will nullify the claim.

Thus, so far as this case is concerned, the Illinois court announces no rule helpful to appellee. To the extent that it does differ in philosophy from the views of the courts of Kentucky, Pennsylvania, Wisconsin, Kansas and Tennessee, it is a minority rule but even the philosophical differences disappear in the face of the facts presented in the case at bar.

In the court below, appellee sought to make much of the point that the government should be glad to support it because appellee's activities were beneficial to the government (Tr. 484, 485). If that theory has any validity, it is apparent that every employer organization, every union and every conceivable person who in his own primary interest did something incidentally beneficial to the government should be entitled to be supported by it. The fact is that in San Francisco, the Army directly employed a very substantial number of longshoremen and appellee solicited the tonnage tax on account of cargo so handled directly from the Army. The Army refused to make any such payment (Tr. 484).

It was also asserted by appellee in the lower court and found by the Court (Finding 16, Tr. 41) that the Army has allowed the tonnage tax as an item of overhead expense. No Army or government official so testified nor is such a fact properly inferable from any documentary evidence in the record. If true, it would only demonstrate the more clearly how violative of public policy the whole method of appellee is. Certainly, no public official can bind the government to such a charge, when the law wholly condemns it as a matter of public policy.

But, appellee says, the Court finds (Findings 11 and 14, Tr. 39, 40), that appellant has paid the tonnage tax on account of War Shipping Administration cargo and some Army cargo. None of that cargo is involved in this suit and the statement of these facts utterly begs the question. The fact that one has performed other illegal contracts does not require or permit a court to abandon its principles by enforcing other different illegal transactions between the parties.

In short, the rules of public policy cut squarely across every phase of this case. All by-laws, agreements and practices of the parties are of no moment if the claim which is sought to be here enforced runs counter to the paramount public interest. That it does so is most clearly established by the cases above cited.

In concluding argument upon this point, we add that the vice of appellee's dues program actually runs far beyond the mere addition to the cost of public contracts. It is, when everything is considered, a much

wider and more evil thing. It is, as the corporate resolutions disclose, a plan to lay a toll upon every ton of cargo entering or leaving any Pacific Coast port backed by a threat of boycott in the handling of goods through the medium of a combination with the Longshoremen's Union as stated in the resolution of February 15, 1940 (Defendant's Exhibits *D* and *E*, Tr. 197 to 199). Though the evidence does not show that the Union ever concurred in this plan nor that the plan was ever applied, the fact remains that appellee's design is to fill its coffers by means of what it aptly calls a "tonnage tax," payable by every shipper, member, non-member or governmental agency as a condition to using the ports of the West Coast of the United States. By what right does the appellee arrogate such power to itself? The answer manifestly is by no right whatsoever and the practice should be condemned in its entirety.

**The Tonnage Tax Is Invalid for Want of Uniformity Required by Statute. (Specifications of Error 2, 3, 4 and 10)**

Assuming that, under appellee's Articles and By-laws, there is a power to charge dues against an associate member, such as appellant, the appellant maintains that such dues must, under the statutes of California, be uniform either as to all members of appellee or, in the alternative, must be uniform as to each separate class of members. The appellant asserts that such uniformity does not exist in the present case and that the tonnage tax is therefore invalid and unenforceable.

As previously noticed, the tonnage tax is directed solely to the process of loading and unloading cargo. Any member can employ longshoremen to an unlimited extent without liability for the tax so long as the work done by such longshoremen does not consist of placing cargo aboard vessels or removing it therefrom (Tr. 377, 378). Such a member obviously enjoys at no cost the benefits of the labor contracts negotiated by appellee (Plaintiff's Ex. 34, Tr. 141) and the various other services provided by appellee. Generally speaking, the activities exempt from the tonnage tax are called dock work, that is, the moving of cargo from place to place on docks and in warehouses as distinct from loading and unloading of vessels (Tr. 435 to 437, 475).

The volume of such work is very substantial and the non-uniform effect of exempting such work from the tonnage tax is strikingly illustrated by appellee's Exhibits 41 and 42 (Tr. 181 to 183). Thus, in 1943, in the Puget Sound District, the total man hours of longshoremen for the loading and unloading of vessels were 3,199,313, and for dock work were 2,290,700. In percentage these figures give approximately 58% to loading and unloading and 42% to dock work. In the same year and district, appellant's man hours for loading and unloading were 1,349,369 and for dock work 345,841. In terms of percentage this amounts to approximately 79% ship work and 21% dock work. It is thus at once apparent that appellant by being predominantly engaged in ship work is called upon to pay a far greater tonnage tax than are those members who are engaged predominantly in dock

work. In fact, the record shows that some members, chiefly terminal operators, in the Puget Sound area, substantially never do ship work and thus are not liable for the tax although they are associate members of appellee enjoying its privileges and benefits.

The figures for 1944 (Tr. 182, 183) are similar. In that year total man hours for ship work in the Puget Sound District were 3,554,026 and for dock work 3,097,928. In percentages these come to approximately 53% ship work and 47% dock work. The figures for appellant in the same year are 1,531,128 man hours of ship work and 479,875 man hours of dock work. In percentages these figures give approximately 76% ship work and 24% dock work. Again the burden on appellant is entirely disproportionate to that borne by the membership as a whole.

The statutes under which appellee was organized are Sections 593 to 605e of the Civil Code of California. Section 595, subsection 5, expressly authorized the creation of different classes of membership. It will be recalled that the appellee does have two distinct classes, voting members and associate members, (Plaintiff's Ex. 1, Tr. 50 *et seq.*) and that appellant is an associate member.

Section 598, subsection 10, of the statute authorizes the adoption of by-laws concerning dues, stating that such by-laws may contain provisions for:

> "The fees of admission, transfer fees, dues and assessments to be paid by members of different classes of members and the methods of collection thereof. *Such dues or assessments or both*

*may be authorized to be levied upon all classes of membership alike, or in different amounts or proportions or upon a different basis upon different classes of membership and memberships of one or more classes may be made exempt from either dues or assessments or both.*" (Italics ours)

The plain import of this statute is that uniformity of dues is required except that where different classes of membership exist uniformity based on class distinctions is sufficient. Here, however, there is neither uniformity of dues treatment as to the membership as a whole or by classes. The classes are steamship company voting members and stevedore and terminal operator associate members without voting rights. The by-laws do not classify the membership by separating those who load and discharge cargo from those who do not but the dues program unwarrantedly invents such classifications. The appellee's dues system is thus tied to an arbitrary standard, utterly foreign to the by-laws, which results in the instant case in having appellant, an associate member, called upon to bear a burden entirely out of proportion to that borne by other members either voting or associate. Such a result is neither within the letter or spirit of the statute.

While to the best of our knowledge there are no decided cases directly dealing with this aspect of the statute, the California District Court of Appeals has squarely recognized that uniformity of burden among members of a non-profit association is essential to any valid dues program.

The court announced this rule in *Alfalfa Growers of California v. Icardo*, 82 Cal. App. 641, 256 Pac. 287.

The plaintiff there was a non-profit association formed under a California Act different from that here involved. The court held that no reliance could be placed on that statute, because it contained nothing concerning power to levy dues, but plaintiff asserted that, independent of statute, the by-laws constituted a contract between it and its members and thus sustained the assessment. The court found that, owing to the wide variation in the scope of the operations of the member alfalfa growers, the assessment would necessarily bear upon the members unequally since it was not graduated to the scope or volume of their operations. In consequence, the court said:

> "It is of the very essence of the law of assessments of the capital stock of corporations that the exactions shall be equal and uniform (6 Cal. Jur. 957), and the rule must of necessity apply to corporations which have no capital stock, even when the power is claimed to exist by contract. We determine that such a corporation cannot enforce by action alleged contract for assessments, where the exactions will result in unjust discrimination between its members."

The appellee in the court below argued that the tonnage tax is uniform because it applies on the same basis to all members who load or unload cargo. There would be some merit to this position if such members were a separate class provided for by the Articles and By-laws. Here, however, no such classification exists so that any associate member who loads and discharges cargo is called upon to support the corporation although his rights in it are no greater than those of his fellow associate members who escape the bur-

den and are less than the rights of the voting members, who have, to a considerable extent, ceased to be active in the business of operating steamships since the government took over during the war.

The dearth of authority upon the point is no doubt accounted for by the fact that non-profit associations normally finance their operations by some form of charge which bears equitably upon all members of the group or all members of each of the various classes. It would certainly be novel for any social club to set up different classes of membership and then to disregard such classifications in levying dues, but instead to collect from those using one aspect of the club's services only and thus permit other members to enjoy all the remaining privileges of the club without being charged. Thus, for example, if a social club were to finance all of its operations by charging dues to only such members as actually make use of its library, leaving other members to enjoy and use all other facilities without charge, we would have a parallel situation. Obviously, such a remarkable practice would seldom if ever be employed so as to call for submission to a court of law, and it is therefore not surprising that there is no volume of authority on the subject.

However, no array of authority is needed to demonstrate that the statute requires that any distinctions between members as to dues liability must be a distinction based on membership classifications set up in the by-laws. From this it follows, as the California court held, that except as such distinctions are authorized by statute, the liability of the members of a non-

profit association or corporation for dues must be uniform as between them. The adoption of some measuring stick for dues liability which can and does apply upon a wholly unequal basis as between members, and which wholly ignores the membership classes set up by the by-laws, cannot support a valid claim by appellee.

As we shall show in discussing the next point covered by this brief, the "loading and discharging" rule as a measure of dues possessed the necessary uniformity when applied to voting members only as to all cargo carried by them on their ships, but when applied to associate members the lack of uniformity is apparent.

**Appellee's Associate Members are Not Subject to Liability for Dues Under Appellee's Articles and By-Laws. (Specifications of Error 5 and 10)**

One would naturally suppose that any set of Articles and By-laws of a non-profit association would clearly and simply define the dues paying obligations of its members. The appellee's Articles and By-laws, however, contrive to leave this simple question in a maze of obscurity. The resulting confusion is continued by the acts of the appellee's Board of Directors and officers over a period of years. Consequently, an analysis of the problem involves some considerable historical review of the appellee's affairs.

The Articles set up the two classes of membership, voting and associate, give the standards of eligibility for each class and repose entire voting power in the

voting members (Tr. 55, 56). The Articles say nothing about liability for dues.

The By-laws in Article XII, Section 5 (Tr. 66 to 68), distribute the voting power among voting members in proportion to the number of tons of cargo "loaded and/or discharged by or for such member during the preceding calendar year * * *." A somewhat parallel provision is contained in Article XVI, (Tr. 72) which states:

> "In fixing all dues and levying all assessments, the Board of Directors shall determine the amount to be paid by each member per ton of cargo loaded and/or discharged at each United States Pacific Coast port (except Alaska ports) * * *."

This provision uses the word "member" generally without the prefix "voting" or "associate" and to this extent suggests that both classes may be liable for dues. Likewise this provision omits the phrase "by or for such member" following the words "loaded and/or discharged," but that phrase or its equivalent must be interpolated to give any meaning at all to the By-law.

If there were nothing more than the foregoing, it might well be assumed that the purpose of the by-laws is to charge the tonnage tax against the member, voting or associate, who actually conducts the loading or unloading operation. However, the other provisions of the by-laws and the practices followed cast a very different light on the situation.

Thus Article XXI (Tr. 77, 78) squarely provides for distribution of assets on dissolution to voting

members only. It would be most unusual to require an associate member to pay moneys into the association in substantial amounts (in this case approximately $75,000 for a two-year period) have absolutely nothing to say in the management of the corporation and have no rights in the proceeds on dissolution. It is true that the associate members could agree to terms so unfavorable to themselves but unless that is the clear consequence of the By-laws it cannot be inferred therefrom.

Article XV of the By-laws (Tr. 71, 72) is also of some interest. After providing for initiation fees from future voting members substantially in proportion to the voting power of each, it is provided that associate members shall not be required to pay any initiation fee "unless otherwise ordered by the Board of Directors."

What practical construction was given to these by-law provisions? None of any significance appears in the documentary evidence from the time when the corporation was organized in June of 1937 until the events of February and May of 1940 when it was sought to provide for collection of the tonnage tax as to cargo carried by non-member vessels. Prior to that time the corporate resolutions simply assess the tonnage tax generally without stating what class of member is liable (Tr. 95 to 97). In the proceedings of February 15, 1940 (Tr. 197 to 199) and May 8 and 9, 1940 (Tr. 100 to 103) elaborate procedures, involving agreement of stevedore associate members, were evolved to require the associate members to "col-

lect" the tonnage tax from non-member steamship companies and to remit amounts so collected to appellee. Now, obviously, if under the by-laws the stevedore associate members were or could be made liable as to all transactions in which they conduct loading and unloading operations, no such elaborate measures were necessary. Why were such elaborate measures taken?

The answer lies in one simple fact. By the understanding of everyone prior to the war the tax was one on the cargo to be paid by the carrier. This proposition is iterated and reiterated in the record and the entire philosophy of appellee's case (Tr. 362). This carrier responsibility so far as members of appellee was concerned rested on the voting members, who were engaged in the steamship business, not upon the associate members, who are not carriers. It was in obvious recognition of this general exemption of associate members that the appellee, when the subject of liability with respect to Army cargo arose, sought to rest its claim against the stevedore associate members upon the special "collect and remit" agreement of May 9, 1940, relative to non-member cargoes.

Out of the mass of documents in evidence and dealing with the corporate activities from the date of organization onward there is not a single clear statement that any dues are levied against an associate member pursuant to the by-laws and independent of the special agreement of May 9, 1940. That that agreement, relating to non-member steamship *companies*, does not apply to the United States Army is too clear to admit argument. It was, however, the

straw that the appellee sought to snatch thereafter to save itself from the recognized fact that the By-laws did not permit the direct assessment of an associate member (See Plaintiff's Exhibits 14 and 17, Tr. 110, 111, 115).

More explicitly the very agreement of May 9, 1940, (Tr. 105 to 107) states that appellee will advise the stevedore members of the list of member steamship companies, that is voting members, "for whom the stevedore accepts no responsibility for payment of the tonnage tax." It is difficult to see how any description could make the situation clearer than this agreement. As to cargo carried by member steamship companies, these companies were to pay the tax measured by the same tonnage which fixed their voting power, (Article XII, Section 5 of the by-laws, Tr. 66 to 68) even though such tonnage is loaded or discharged by an associate member stevedore. As to cargo carried by non-members of appellee, the associate member stevedore is liable only by special contract to collect and remit and then only when the non-member is a "company" and not when it is a governmental agency.

This practical interpretation of the By-Laws gives the only sensible solution to the problem, that is, that voting power and dues liability went hand in hand so far as the members were concerned. It was only when the voting members sought to expand their search for funds to their non-member competitors that the associate members were brought into the picture. As the voting members, with the advent of the war, ceased acting as carriers because their ships were taken over by the government, they sought to eat their cake and

have it by passing the financial burden on to the associate members while nevertheless retaining the whole voting power and right to divide the assets on dissolution.

It is true that at the trial Mr. Foisie, the appellee's president, stated that in the early history of the corporation associate members sometimes paid the tonnage tax on account of cargo handled for voting members. His admission that these instances were few in number and governed by special contract between the particular voting and associate members involved in such cases makes this testimony valueless on the fundamental question of liability (Tr. 379, 380, 431). The letter of this witness, in evidence as Defendant's Exhibit A (Tr. 186), clearly shows that prior to the war the financial burdens of appellee were the responsibility of the voting members.

It is axiomatic that the practical interpretation of the parties will govern the meaning of doubtful contractual provisions. Certainly the contract contained in the By-Laws, between appellee and its associate members, is, at best, ambiguous on the question of the latter's liability and the subsequent history of the company demonstrates that the true meaning of the By-Laws is that no associate member is liable for dues.

It is recognized by the authorities that the by-laws of a non-profit corporation or association govern the rights and liabilities of its members and cannot be expanded to include matters not within their reasonable import.

14 C.J.S., page 1291;

Fletcher on Corporations, Permanent Edition, Sec. 6597;

*Jackson v. Minnetonka Country Club*, 166 Minn. 323, 207 N.W. 632;

*Duluth Club v. McDonald*, 74 Minn. 254, 76 N.W. 1128;

*Thompson v. Wyandanch Club*, 127 N.Y.S. 195;

*Pendennis Club v. United States* (U.S.W.D. Ky.) 20 F. Supp. 758.

**The Resolutions of Appellee's Board of Directors Purporting to Levy the Tonnage Tax are Invalid Because Not Authorized by Vote of the Membership. (Specifications of Error 6 and 10)**

Article 4, subsection f of the By-Laws (Tr. 59), grants authority to the appellee's Board of Directors to levy dues in the following language:

> "To levy, affix and collect, and provide for the collection of, dues or assessments in accordance with the provisions of these by-laws; but the Board of Directors shall not have the power to levy, assess or collect dues or assessments in excess of a maximum rate to be fixed, at a regular or special meeting, by vote of the members holding a majority of the voting power of the entire membership;"

Appellant maintains that the latter portion of this resolution requires, as a condition precedent to the levy of dues by the appellee's Board of Directors, that the voting members of the appellee, at a regular or

special meeting, fix maximum rate of assessment. No such action was ever taken by the voting members at any such meeting (Tr. 548 to 550) and, consequently, the appellee's Board of Directors have, in adopting all resolutions pertaining to the subject of dues, acted without authority. The clause in question specifically provides that the Board of Directors "shall not have the power" to levy any dues in excess of the maximum rate "to be fixed" by the voting members. Clearly that anticipated the fixing of such a rate before the Board of Directors could take any action.

**Appellee's Board of Directors Have Never, in Fact, Adopted Any Resolution Levying the Tonnage Assessment Against Any Associate Member Including the Appellant. (Specifications of Error 7 and 10)**

In discussing the proposition that the appellee, under its Articles of Incorporation and By-Laws, is without power to levy or collect dues from any associate member, we reviewed the various resolutions adopted by appellee's Board of Directors from the time when the appellee corporation was formed in June of 1937 down to the resolution of June 25, 1942. In all there were eight resolutions, being respectively, that of July 31, 1937 (Tr. 95, 96); that of May 11, 1938 (Tr. 96, 97); that of February 14, 1940 (Tr. 99, 100); that of February 15, 1940 (Tr. 197 to 199); that of May 8, 1940, including the Form of Memorandum Agreement dated May 9, 1940 (Tr. 100 to 103); that of March 12, 1941 (Tr. 110, 111); that of April 16, 1942 (Tr. 111); and that of June 25, 1942 (Tr. 115).

The first two of these resolutions do not in any way state what class of member is to pay the tonnage tax. As we have already shown, however, it is clear from those resolutions that the tonnage tax there provided for was the tax against cargo and was primarily directed against the carrier member steamship companies. The same is true of the resolution of February 14, 1940. Commencing with the resolution of February 15, 1940, and continuing through the resolution of May 8, 1940, the appellee was concerned with the question of collecting on account of tonnage carried by non-member steamship companies and in those instances provided only for the collection of the tonnage tax by stevedores from non-members under a special arrangement agreed to by the stevedoring companies.

The following resolutions of March 12, 1941, April 16, 1942, and June 25, 1942, all refer back to the special arrangements of 1940 concerning the stevedores' responsibility to collect from non-member steamship companies. At no point in any of the resolutions is it directly or inferentially stated that the tonnage tax is levied upon the associate members independent of the special arrangement made by the agreement dated May 9, 1940, concerning non-member steamship companies. It is perfectly clear that no reasonable standard of interpretation can bring the cargo loaded for the account of the United States Army within the provisions relative to non-member steamship "companies."

The appellee's claim of the applicability of the reso-

lutions to associate members nevertheless rests entirely upon that untenable proposition.

It certainly must be true that any member of the appellee non-profit corporation cannot be held to any obligation to pay dues until such time as the Board of Directors has, by definite action, adopted a resolution imposing such an obligation upon it. Assuming that the Board has such a power with respect to associate members, which power, however, the appellant denies, the fact remains that until that power has been exercised by an appropriate resolution the appellant cannot be liable. The resolutions, taken collectively, do not approach the form of a direct levy on the appellant or any other associate member but seek to accomplish this result by referring back to the special contract of May 9, 1940, which can not possibly be applicable to Army cargo and, in any event, limits the responsibility of stevedoring companies to trying to collect and remit from non-member steamship companies.

**The Appellee's Tonnage Assessment Program, As Applied to the Appellant, Is Invalid Because Based Upon Threatened Duress. (Specifications of Error 9 and 10)**

To any person viewing this case for the first time the thought may occur that if the appellant is not satisfied with the appellee's methods it can avoid any obligation by resigning its membership in the appellee's corporation. There are, however, two immediate answers to this idea. The first, to which we shall refer again in conclusion, is that the appellant is not re-

quired to resign simply because the appellee adopts an improper system of financing its operations. Rather, the appellant is entitled to remain a member and to insist that the appellee's dues program and policies be set up and maintained in accordance with law.

The second answer pertinent to the proposition now under discussion is that the appellee has made it clear, through its corporate resolutions, on several occasions that it proposes to exact an even greater charge from non-members who refuse to pay the tonnage tax.

In the very first resolution, adopted on the subject of dues by appellee on July 31, 1937, the appellee's Board of Directors inserted the following clause:

> "Operators who are not members of either individual port associations or the Coast Association; 2½ cents per man per hour."

On February 15, 1940 (Tr. 197 to 199), the Board of Directors increased this man-hour assessment to non-members to four cents per man-hour and proposed combining with the Longshoremen's Union to withhold men from any non-member refusing to comply.

In the May 9, 1940 agreement (Tr. 101 to 103) the final clause read as follows:

> "The district associations undertake to collect from non-member stevedores for their non-member steamship companies a man-hour charge of 4 cents in lieu of the membership tonnage, and remit to the Coast Association."

The appellee further, on February 25, 1943, passed an extended resolution directed against appellant in

which, among other things, it adopted a policy which it apparently thought would control or influence the action of the Port Association, Waterfront Employers of Washington, of which appellant is also a member. It there provided:

> "RESOLVED, that San Francisco employers having agents in Seattle advise them fully of these proceedings with instructions to such who are members of the Washington Board of Trustees to attend any meeting called to consider this matter and vote to support the action of the Coast Board."

Taking these actions as a whole, it is apparent that any member who withdraws from the appellee will not place itself beyond the demands of the appellee. Rather, it will place itself in the unfavored position of a non-member without right but subject to the 4 cents per man-hour demand as a condition to procuring longshoremen from the hiring halls jointly conducted by appellee and the union (Tr. 324, 325, 351). The 4 cents per man-hour rate would amount to about 52 cents an hour for a longshore gang of thirteen men while the 2½ cents tonnage tax, translated to a man-hour basis for the same gang, would amount to 37½ cents (Tr. 598). Thus the threatened action, if effective, would be even more costly to appellant than the tonnage tax.

Further, as the resolution last quoted from shows, appellee definitely attempts, through domination of the employees of appellee's San Francisco members, to have the trustees of Waterfront Employers of Washington take coercive action against appellant as a mem-

ber of the Washington organization, if appellant refuses to accede to appellee's demands.

The threats of economic compulsion contained or inherent in these measures are so fundamentally contrary to public policy as to justify this court in rejecting any demand based upon them.

**The Appellant Has Never Made Any Enforceable Agreement to Pay the Tonnage Tax. (Specifications of Error 8 and 10)**

Any possible liability of appellant under any theory of contract is, of course, eliminated if the public policy arguments heretofore made are adopted. Independent of the public policy aspects of the case, however, there is no basis for holding appellant in contract.

The only possible basis for a theory of contractual liability are three. First, the contract contained in the By-laws of appellee. Second, the May 9, 1940, agreement concerning cargo carried by non-member steamship companies. Third, a certain document signed by appellant's secretary under date of March 11, 1943.

The first and second of these possibilities have already been disposed of in this brief. The third is equally without merit as a basis for liability.

A brief examination of the events surrounding the March 11, 1943, document suffice to show that it is not a contract in the legal sense. At that date appellant had not paid certain of the tonnage taxes which appellee claimed it owed on account of Army cargo.

Appellee sent a committee from San Francisco to Seattle to attempt to secure payment. This committee and appellant, on March 10, 1943, for some reason undisclosed, took the matter up in a meeting of the Washington Association rather than privately. After some discussion appellant's attorney stated, according to the minutes of that meeting (Tr. 129), that there was "a moral obligation to pay." On the following day, the attorney, as Secretary of the appellant, signed the letter in evidence as Plaintiff's Exhibit 25 (Tr. 132, 133). Before signing this letter, the attorney refused to consent to having his client give a note for the amount claimed to be due because "I did not want to change its relationship to the Association, its legal relationship" (Tr. 610).

This letter then was nothing more than a recognition of the expressed moral obligation. Especially as to further tonnage assessments—and nearly all those involved in the present case are those subsequently accruing—it is unthinkable that appellant's counsel would agree to put his client in a position where its liability for dues would rest on a special contract wholly independent of its rights under the By-Laws, while all other members of the appellee corporation would be chargeable under the By-Laws only. To so do would place appellant on an entirely different footing from other associate members and thereby impair the value of its membership.

Further, there is no showing of any consideration whatsoever for this agreement. It was simply the unilateral expression of a then existing intention which is in no way legally binding.

## CONCLUSION

It is not possible within reasonable and required limitations of space to explore every detail of the record in this case and we believe it quite unnecessary to do so. The essential facts have been covered and, in the light of applicable law, they demonstrate absence of liability upon the separate independent grounds already urged.

In concluding, however, we believe the court should be mindful of a few general propositions in this case.

The first of these is that the appellant has had no effective part in adopting or maintaining the dues program which it now challenges. As an associate member without voting power, it has been required to cope with the policies formulated and handed down by directors and officers designated by the voting members. Appellant's objections to these policies and supporting measures have, up to this stage, been ineffective, and it seeks the aid of this court to accomplish a result which it believes to be right and proper but which independently it is powerless to attain.

Second, the trial court has found, and it is a fact, that appellant has paid some tonnage taxes in the past on governmental cargo. Such past submission to illegal exactions certainly affords no basis for subsequent liability particularly when aspects of public policy are considered. Under such circumstances, appellant is to be commended rather than condemned for discontinuing payment.

Third, the trial court has found, and it is a fact,

that appellant has participated in benefits provided by the appellee. This, however, entirely begs the question here presented. Appellant is not under any principle of law bound to resign its membership as a condition precedent to challenging the legality of appellee's acts. Rather, it is fully entitled to remain a member and insist that appellee's affairs be conducted in a legal manner. The contrary hypothesis would permit any government or group to impose wholly illegal exactions upon its citizens or members and then answer a challenge of legality by simply saying that the citizen or member has benefited from the illegal conduct.

The appellant cannot successfully escape any legal impositions of the appellee corporation, but it submits that the dues program in this case is wholly tainted with illegality on the several grounds herein discussed and that this court should, by dismissal of this case rectify the intolerable situation in which appellant finds itself, leaving appellee to design a legally valid method of financing its operations.

Respectfully submitted,

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